NO. 92-515

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

STATE OF WISCONSIN,

Petitioner,

v.

TODD MITCHELL,

Respondent.

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SUPREME COURT, U.S.

On Writ of Certiorari
to the Supreme Court of Wisconsin

BRIEF AMICUS CURIAE OF THE WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (WACDL) IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS

The Wisconsin Association of Criminal Defense Lawyers (WACDL) is a professional association of attorneys who devote a substantial portion of their practice to the defense of persons accused of crimes. The Association is committed not just to defending criminal cases, but to guaranteeing that the constitutional rights of even the most unpopular defendants are preserved.

Wisconsin v. Mitchell involves issues which are of fundamental importance to the members of WACDL and their clients. The lawyers of WACDL are those who will be most intimately involved with litigating future cases that depend on the Court's decision in Mitchell. We therefore respectfully submit this brief as amicus curiae to offer the Court the benefit of our views.

STATEMENT OF THE CASE

On the night of October 7, 1989, Todd Mitchell was standing with several other young black men and women outside an apartment complex in Kenosha, Wisconsin. Earlier that evening, some of the members of the group discussed the film,

"Mississippi Burning." In particular, they spoke about their reactions to a scene in which a black child was the victim of a racist beating. Mitchell then addressed the group, asking, "Do you all feel hyped up to move on some white people?" A few minutes later, Mitchell pointed to a white teenager walking across the street, and said, "There goes a white boy; go get him." The group then attacked the white youth, beat him severely, and stole his sneakers.

Mitchell was indicted and found guilty of aggravated battery and theft. He was also charged under a separate Wisconsin hate crimes penalty enhancement statute, which imposes increased punishment when a defendant:

> intentionally selects the person against whom the crime . . . is committed . . . because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person.

Wis. Stat. §939.645 (1989-90). As a result of the penalty enhancement law, Mitchell was sentenced to four years in prison, instead of the two years he would have received for aggravated battery.

SUMMARY OF ARGUMENT

Any time society is faced with the threat of violence, it is essential not just that we respond to the threat, but that we meet these perils in a manner consistent with our constitutional rights. Unfortunately, there have been instances where we have responded not with reasoned policy, but with panic and fear. The result was legislation that diminished the liberty of not just those who seemed to present the danger, but of us all.

Fear of violent foreign political philosophies led to criminal syndicalism laws that limited everyone's right to read, write and speak. See DeJonge v. Oregon, 299 U.S. 353 (1936); Fiske v. Kansas, 274 U.S. 380 (1926). The Republic ultimately survived these scares, but with no help from laws that abridged the First Amendment. With but a few years' historical perspective, these incidents of fearful, crisis-generated legislation are now recognized for what they truly are -- an embarrassment which we hope could not be repeated under present constitutional standards.

Today, as Petitioner so eloquently details, the United States faces a serious problem of bias-related violence. It is not

Mitchell's intention to belittle or minimize the importance of this issue. Hate crimes must be eliminated if we are ever to achieve the goal of a free and equal society. Yet this goal is not advanced by statutes which merely pile additional penalties on those who express a loathsome reason for committing acts which are already criminal. The right of all people to assert their opinions, regardless of how unpopular or odious, must be preserved -- even if this means sentencing a hate criminal under the same guidelines as one who committed the offense for a more acceptable motive.[1]

Todd Mitchell was properly convicted and punished for committing aggravated battery and theft. His conviction under Wis. Stat. §939.645 added two years to his sentence only because he had the temerity to express an improper motive for his crime. There can be no doubt that if he had simply kept his mouth shut, he could not have even been charged, let alone convicted, under the enhancement law. Indeed, the Wisconsin statute can only be used against those who give voice to their opinions. A criminal

[1] Among the traditional motives deemed more acceptable by the Wisconsin legislature are: avarice, lust, anger, envy, vanity, sloth and gluttony.

who maintains a respectful silence, regardless of how bigoted his motive, can never be convicted.

Enforcement of the Wisconsin law places an improper chill on the right of every person to express an opinion which may at a future time be considered evidence of bias. This chill affects not just criminals, but everyone who desires to make a statement. It falls particularly heavily on those who engage in radical political speech.

The penalty enhancer also permits the use of otherwise inadmissible, and highly prejudicial evidence at the trial of the substantive offense. This considerably increases the chance that a person will be convicted -- not necessarily of the bias law, but of the underlying crime.

The greatest danger to a free society comes not from its enemies, but from its well-meaning friends, who would solve democracy's problems by surrendering the freedom which is its greatest treasure. The Wisconsin hate crimes statute is a well-intentioned, but panicky attempt to solve a serious problem.

Unfortunately, it tries to do so in a way that will substantially and improperly chill the First Amendment rights of us all.

ARGUMENT

THE WISCONSIN PENALTY ENHANCEMENT STATUTE PUNISHES NOT ACTIONS, BUT THOUGHTS AND THE EXPRESSION OF THOSE THOUGHTS. MOREOVER, THE STATUTE IS OVERBROAD BECAUSE IT SWEEPS WITHIN ITS AMBIT A SUBSTANTIAL AMOUNT OF ACTIVITY PROTECTED BY THE FIRST AMENDMENT.

A. The Wisconsin Penalty Enhancement Statute Punishes Not Actions, but Thoughts and the Expression of Those Thoughts.

All parties and amici seem to agree that if the Wisconsin statute punishes speech or thought, as opposed to conduct, it must be declared unconstitutional even if it advances a societally desirable goal. Consequently, this case turns on the question of whether the stated motive for committing a crime is a criminal act itself, or is a separate and protected expression of the actor's thoughts.

It is noteworthy that the conduct with which Respondent was charged is already criminalized by several other Wisconsin

laws.[2] Mitchell was convicted under those laws and sentenced to years of imprisonment, independent of any enhancement provisions. It was only his motive -- an operation of his mind manifested by the exercise of his voice -- which allowed the state to impose extra punishment under the hate crimes statute.

Petitioner claims that the statute is necessary because crimes motivated by certain kinds of hatred present a more serious danger to society than crimes committed for other reasons. In support of this position, petitioner argues that bias-related crime is particularly evil because of the fear and distrust it engenders within and between racial, religious and ethnic groups. Petitioner's Brief at 25-27. Yet this bias-related pain is not caused by the criminal acts, or even by the selection of a victim. Rather, it results solely from the expression of the motive. For example, if a Christian walks up to a Jew and silently punches him in the nose, the victim may experience a particularized fear of his assailant, and a generalized fear of street crime. Yet he will not experience the

[2] Mitchell was concurrently found guilty of aggravated battery, party to a crime, Wis. Stat. §939.05 and 940.19(1m); also, theft, party to a crime, Wis. Stat. §943.20(1)(a) and (3)(d)2.

kind of bias-related fear at which the Wisconsin statute is aimed. It is only if the same attack is accompanied by some expression of anti-semitic opinion that the particular evils of bias crime come into play. Thus, the Wisconsin enhancement provision does not even attempt to punish one for the harm caused by a physical act. Rather, it targets only the harm caused by the expression of hurtful opinions. Such expression, however, is absolutely protected by the First Amendment, regardless of the pain or fear it may engender. R.A.V. v. City of St. Paul, Minnesota, 112 S. Ct. 2538 (1992).

That the Wisconsin statute is aimed at speech is further proven by the fact that it is impossible ever to secure a conviction unless the defendant makes a constitutionally protected expression of his bias. Petitioner asserts the purely theoretical claim that "one could violate this statute while remaining entirely mute." People v. Grupe, 532 N.Y.S.2d 815, 818 (N.Y. City Crim. Ct. 1988). Realistically, however, such a violation could never be proven. For example, if a Jew walks up to a Christian while silently thinking, "I hate all Gentiles, and because of that hatred I am selecting this one for a punch in the nose," he would theoretically

be violating the Wisconsin statute as soon as he delivered the punch. Of course, he could never be convicted under the hate crimes law because he never expressed his motive in a way that could be proven at trial. In fact, as long as he remained discrete, he probably could not even be charged under the enhancement law.

Thus, no one will ever have his or her sentence enhanced for merely acting on an unexpressed bias motive. That the victim and the accused come from different backgrounds is never in itself sufficient to prove bias. Punishment will only be increased for those who have the audacity to express their motive. Of course, every conceivable manner of such expression, whether by speech, association or assembly is protected by the First Amendment.

In a related civil context this Court noted that punishment cannot be imposed for protected expression even if it supplies the motive for a crime. In N.A.A.C.P. v. Claiborne Hardware Company, 458 U.S. 886, 918 (1982), this Court held that "[w]hile the State may legitimately impose damages for the consequences of violent conduct, it may not award compensation for the consequences of nonviolent, protected activity." The incident

underlying Claiborne was a boycott the N.A.A.C.P. organized against white merchants in Claiborne County, Mississippi in 1966. The merchants ultimately sued for damages sustained both as a result of the boycott and as a result of violent incidents committed by supporters of the boycott. The Court ruled that while violent acts could result in civil liability, the boycott itself was protected by the First Amendment even if it was the sole motive for the violence. Those who organized or supported it could therefore not be sued for damages.

Thus, the Court in Claiborne drew a line between damage resulting from violent acts and damage resulting from protected expression which might form the motivation for the violence. The former can be punished, the latter cannot.

The facts of Claiborne are analogous to those of the case at bar. Like the boycott, Mitchell's statements were protected by the First Amendment. Like the boycott-related violence, the attack in Kenosha was motivated by Mitchell's bigoted pronouncements. It therefore follows logically, that as this Court held in Claiborne,

the violence committed by Mitchell can be punished, but the protected expression of his motive cannot.

Petitioner has also claimed that this Court's recent decision in Dawson v. Delaware, 112 S. Ct. 1093 (1992) provides support for the constitutionality of the Wisconsin penalty enhancer. Dawson, however, stands only for the proposition that a defendant's statements, even if protected by the First Amendment, may be admitted into evidence at a criminal trial if they reflect a motive relevant to establishing his guilt. Dawson does not, however, provide any support for the notion that the statements or motive can themselves be punished as a separate crime. Therefore, if applied to Mitchell, all Dawson means is that Mitchell's statements could have been introduced at his trial for aggravated battery, if they were sufficiently relevant to proving he committed that crime. They cannot, however, be made into a separate crime for which he can be punished beyond his sentence for the battery.

B. The Wisconsin Penalty Enhancement Statute is Overbroad, Because It Sweeps Within Its Ambit a Substantial Amount of Activity Protected by the First Amendment.

A statute will be declared overbroad when it is not aimed "with sufficient specificity at evils within the allowable area of state control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech." Thornhill v. Alabama, 310 U.S. 88, 97 (1940). The Wisconsin penalty enhancement statute is overbroad because it "criminalizes a substantial amount of expression that -- however repugnant -- is shielded by the First Amendment," and thereby has an impermissible chilling effect on the exercise of free speech. R.A.V. v. City of St. Paul, Minnesota, 112 S. Ct. 2538, 2559 (White, J., concurring) (1992).

Petitioner has glibly asserted that there is no chill on free speech, because all a person must do to protect his or her First Amendment rights is to refrain from committing an underlying crime. Petitioner's Brief at 41, 44. The difficulty with this view is that the statute requires no temporal nexus between a criminal act and the evidence introduced to prove a bias-related motive. It is perfectly permissible for the state to introduce evidence of past statements, writings, memberships, associations or subscriptions,

on the theory that they are still probative of the defendant's present motive. The chill may therefore occur not when the crime is committed, but months or years earlier, when the speaker had no intention of engaging in criminal behavior, but was merely expressing odious or unpopular views.

Because of this "delayed chill," the Wisconsin statute will have the most serious impact on that speech which is most important to protect. Political activists of all stripes are the people most likely to engage in hyperbolic, overstated language directed at other groups or opponents. They are also among the most likely people to be aware of new laws which might result in future punishment for their present views.

Although the overbreadth doctrine is "strong medicine," to be used "sparingly," Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973), the inhibition of political speech presents the most compelling case for invalidating a statute. See Buckley v. Valeo, 424 U.S. 1, 14-15 (1976); Mills v. Alabama, 384 U.S. 214, 218 (1966); Roth v. United States, 354 U.S. 476, 484 (1956).

The Wisconsin statute is not merely overbroad because it threatens speakers with increased sentences. It also substantially chills free speech because it significantly and improperly increases the possibility that one will be convicted of the underlying crime.

As this court noted in Dawson, evidence of a defendant's prior statements and associations may be admissible if they are relevant to proving an element of the crime. But even if a past statement is relevant, its probative value must outweigh the prejudicial impact on the trier of fact. Under the Wisconsin penalty enhancement law, however, a defendant's past statements will always be admissible because motive is always an element of the crime. Moreover, despite Wisconsin's evidence code, which permits the use of a general probative/prejudical test, there can be no real balancing between prejudicial and probative values; the more prejudicial a statement is, the more relevant it is to establishing the sole element of the enhancement statute. Wis. Stat. §904.03.

For example, in United States v. Millen, 594 F.2d 1085, 1088 (6th Cir. 1979), the defendant was a doctor accused of

murdering someone with a lethal injection of demerol. During the trial, the prosecution, supposedly to establish a motive for the crime, was permitted to introduce evidence that the defendant had been homosexually involved with the victim. In reversing, the Sixth Circuit ruled that "the prejudicial aspect of the answer given far outweighed any obvious or apparent probative value."

Assume, however, that Millen had also been charged under the Wisconsin law with selecting his victim on the basis of sexual orientation. The statement's prejudicial impact on the jury's consideration of the underlying crime would be the same. Nonetheless, it would now have to be admitted into evidence because its very outrageousness establishes the element of bias for the enhancement law.

Thus, the hate crimes statute guarantees that if a person is ever charged with a crime, the chance of conviction is substantially increased because otherwise inadmissible speech is transformed into proper evidence.

CONCLUSION

The judgment of the Wisconsin Supreme Court should be affirmed.

Respectfully submitted,

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